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THE CONFLICTING ISSUES IN COMPETITION LAW AND INTELLECTUAL PROPERTY LAW IN INDIA

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Abstract

The research paper mainly focuses on the interface between Intellectual Property Rights and Competition law and analyse the competition issues involved in the exercise of Intellectual Property Rights and also whether CCI is effectively dealing with the Competition law issues involved in IPR? Intellectual Property Law creates monopolistic rights, but Competition Law tries to prevent and hence the conflict between the two. A balance needs to be maintained among the rights of persons granted to them under the law and necessity to retain the competition in the market.Three are several conflicting issues related to exercise of IPR which must be addressed by the competition commission through its guidelines.

Introduction

The interaction between IPR and Competition law is a matter of growing concern in recent times. Intellectual Property Law creates monopolistic rights, but Competition Law tries to prevent and hence the conflict between the two. A balance needs to be maintained among the rights of persons granted to them under the law and necessity to retain the competition in the market.[1]History of Indian Competition Lawstarted when MRTP Act, 1969 wasenacted. The MRTP Act exempted from its purview of application any monopolistic or restrictive trade practice necessary to safeguard the rights of patentees under the Indian Patent Act with regard to certain infringement and conditions that may be laid down in the license.

It is relevant to note that in the report of Raghavan committee constituted by Government of India on competition Law and policy in the year 2000 in Para 5.1.8 also observed that when there is clash between intellectual Property right and competition law which results anti-competitive effect must be addressed

[1]Ramappa, *Competition law in India Policy, Issues and Development*(Oxford University Press, 2013, p. 109

under Competition law.

The real issue is the exercise of IPR rights under competition law regime. Striking a balance between implementing competition laws and innovators right in enjoying his rights granted under regime is the goal to be achieved. Intersection of IP and Competition law is observed when there is an imbalance between the exclusivity rights accorded by IP law and anti-competitive practices that the Competition law tries to protect.[2]

Concerns often arise when rights conferred under IP laws become as a tool to defeat the competition law's provisions. Under Section 3(5) of the Competition Act imposition of reasonable conditions protecting rights conferred under IP laws exempts from the purview of competition law. But enterprises actions under section 4(2) shall be treated as an abuse, be equally applicable to the holders of Intellectual property too.It suggests that any unreasonable condition while licensing his intellectual property by holder of IPR will be considered as violating the competition law.One ofthe example of unreasonable condition is exclusive licensing, which also include cross-licensing by parties that collectively hold market power,grant-backs and acquisition of IPRs.It is important to note that some of these conditions would not be unreasonable per se and thus a comprehensive analysis under rule of reason needs to be done to ascertain that the condition is anti-competitive or not.In case of anti-competitive conditions,order that can be passed by competition commission are like cease and desist, changes in licensing agreements.

Anti-competitive Agreement and IPRs

Anti-competitive agreements are seen from the point of view of its likely effects on the market. These likely effects may be then be characterized to be determined through various efficiency when the claims are made to use a modern approach.[3]

There are three types of efficiencies essentially attributed to the modern economic approach viz. allocative, productive and dynamic.[4]Competition law aims at maintaining allocative as well asproductive efficiency (both together are termed as static efficiency) in the market.Dynamic efficiency is seen as an important imperative in favor of IPR which are made to incentivize owners so that they can contribute in developing markets through innovation.Thus, IPR agreements which essentially are supposed to be aimed at furthering innovation, therefore, require a treatment at first place while determining Appreciable Adverse Effect on competition where the positive effects in present or future may outweigh negative effects. A balance is required to be created.[5]

[2]Manoj Sinha and Susmitha P Mallaya, *Emerging Competition Law*, Wolters Kluwer, 2017.
[3]Steve Anderman,*Outlines of an Economics Based Approach*, Edward Elgar Publishing, Inc., Northampton, 2008).
[4] Ibid.
[5] Manoj Sinha and SusmithaP Mallaya, *Emerging Competition Law*, Wolters Kluwer, 2017.

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The crux of the competition policy is to ensure that companies do not maintain a monopoly over markets. In the recent past, the competition authorities and the Courts have prohibited some blatant exercise of IPR rights by the owner of IPR though lawful under Intellectual Property Rights but violative of provisions of competition Law.[6]IPR related anti-competitive practices may involve collusion, suppression of incentives to innovate or exclusion of competitors. Some specific restrictions in licensing agreements may involve territorial restrictions exclusivity which might violate the provisions of competition law. Anti-competitive behavior related to the exercise of IPRs between direct competitors clearly occurs, for example, when holders of substitutable technologies enter cross-licensing arrangements which can be compared to cartel agreements aimed at setting commonly agreed prices for the products and services incorporating those technologies. Cross -licensing can be detrimental to competition if the patent-holders coordinate the prices, as this could raise entry barriers to market access in incoming competitors.

Anti-competitive analysis of licensing provisions

Licensing of patent is animportant area where there is a conflict between IP and competition law. While exercising their intellectual property rights, the owner of these rights, especiallypatentees and copyright holders, impose certain conditions that can have conflict with competition law. Here we will discuss briefly the conditions/provisions relating to license that is most likely to be challenged under competition laws.

Exclusivity

Grant of an exclusive license may by implication precludes the licensor from granting another licensee. The grant of exclusive licensee bars the licensor to practice the invention unless he has specifically reserved the right to do so. The granter may, however, retains the right to practice the licensed subject matter. The grant of exclusive license precludes the licensor from competing with the licensee in respect of the license and competition issues arises, particularly where the licensor and licensee would be actual or potential competitors but for the license.[7]

Tie-in Arrangements

Tie-in clauses in an intellectual property licensing requires the licensee to obtain raw materials, spare parts, intermediate products for use with licensed technology, only from the licensor or its nominees. These clauses also oblige the licensee to use personnel designated by the licensor. The main reason behind the use of tie-in clauses by licensor seems to be based on the fact that it wants to preserve an exclusive right to supply necessary processed or semi-processed inputs, to maintain quality control, and to expand their profit margin. By virtue of this exclusive position, the licensor charges higher price than for comparable

[6] Section 19(4) of the Competition Act 2002.

[7]Abir Roy& Jayant Kumar, *Competition Law in India*, Eastern Law House, New Delhi, 2014.

equipment and other inputs that could otherwise be obtained elsewhere. The use of tying clauses not only affects production costs through the overpricing of inputs but may have important indirect effect on the import substitution, export diversification and growth efforts of licensee,[8]

Patent Pooling

The pooling of patented technology is not inherently restrictive of competition. To the contrary, the combination of complementary technology may facilitate their efficient use and exploitation. In other cases, however, the pool may eliminate competition between members in pool.When third parties excluded by firms pooling their patents in the manufacturing industry and agree not to grantlicense to them by fixing quotas and prices.In case group chooses any restricted practice then market power will be in the hands of a few entities, that is anti-competitive.This pooling help the involved firm in earning super normal profits and further act as a barrier to new firm. Thus, Patent pools have both pro-competitive as well as anti-competitive effects.

Cross Licensing

When two or more-person inter-change their intellectual property rights, it is called Cross licensing. It is menacing to competition when technology licensed is replacement rather than corresponding in nature.Nature of technology license, the behavior of firms, effect on market and structure of royalty payment determine the validity of cross-licensing agreement.The threatof cross licensing is surge prices, decrease production and reduced innovation. Cross licensing most common effect is monopolization of market as competitors in the market remain only few.

Abuse of Dominant Position and IPRs

The exercise of exclusive rights conferred by IP in a way which leads to refusal of license or charging excessive pricing will be covered under the provisions of abuse of dominant position. Therefore, Intellectual property rights related abuse of dominance is subject to action under Competition Act just as IP related dealings in anti-competitive agreements leading to an anti-competitive effect.[9]Abuses are explained in section 4 of Competition Law.

However, we find no provision under section 4 dealing specifically on IPR related issue. Action can only be taken in cases where abuse of dominant position resultsappreciable adverse effect on the competition. Such IPR related abuse may lead to elimination of effective competition from the market. It is seen that the enterprises indulging in abuse of dominant position defends themselves by arguing that they were exercising their intellectual property rights and therefore they are exempted under the Competition Act.

[8]Dr. Md. Zafar MahfoozNomani and Dr.Faizanur Rahman,*Competition Law*,university book house pvt. ltd (1 January 2019).
[9]IGNOU Publication, *Trade Secrets, Competition Law and Protection* of TCE. p.51.

Further, an important aspect is given in Section 19(4) (g) which again is a factor to be taken care of while CCI inquire about the dominant position of an enterprises under Section 4. This sub-clause covers the monopoly or dominant position acquired as result of statute. IPRs are but legal monopolies and thus they ought to be covered under this provision. Factors which need to be take care will include the extent to which ownership of IP puts the holder in a dominant position and the circumstances in which the exploitation of that IP can cause abuse of the position induced by IP. This dominant position will go against the provisions of Competition Act only if that position is abused. That position can be abused by charging excessive prices, applying restrictions on end users, applying restrictions on consumers or refusal to deal etc.[10]

Excessive Pricing

In countries like America and Canada monopoly/excessive pricing is not an abuse butin the developing countries like India due to limited number of substitutesand as most of the IPR protected product are owned from foreign countries, monopoly pricing is of greater significance.Here under Section 4 of Competition Act, charging ofexcessive/unfair pricing by the dominant entities is prohibited as Excessive pricing has effects of excluding competitors. This conflict between IPR and competition law need to be prevented as it often results weakening of competition in a secondary market under competition law. The remedy for this in extreme cases are division of enterprise and compulsory licensing.

Refusal to License

A refusal to license a patent represents one of the most controversial issues in the patent-competition law relationship. A patent right confers to its owner the right to exclude other from the patented technology. However, by refusing to license its technology, the patent owner might foreclose its competitors from the market and eliminate competition. The patent owner's refusal to license might thus raise anti-competitive concerns.

Mergers and IPRs

As per Explanation (c) to Section 5 of the Competition Act, the value of assets will include the value of IPR as well .Thus, the Competition Act recognizes the importance and value of IP assets and provides that the value of assets shall include the value of IP assets as described above.

When firms are involved in acquisitions or mergers, or in the creation of concentrating joint ventures (which have similar effects as a merger, and thus subject to merger control), there is an increasing tendency for the instruments of transfer to include specific provisions to restrict competition and sometimes to a

[10] Ibid.

substantial and unacceptable degree. These provisions might be for use, disposal or licensing of the respective parties' IPRs. The broad test of whether the restrictions are acceptable or not is whether they are ancillary to the main transaction: that is, whether they are a necessary and reasonable part of it. If they are, they can be referred to as ancillary restraints (or restrictions) and can be accepted as such. If they are not ancillary to the main transaction, they are liable to infringe the rules on competition.[11]

Section 20(4) (I) of the Act provides 'nature and extent of innovation 'as one of the fourteen factors which the CCI shall have due regard whiledetermining whether the proposed combination would be violative of the provisions of competition law. Thus, even in analyzing combinations the Act foresees a possible relation with the intellectual property and thus provides that nature and extent of innovation ought to be taken care of while analyzing the effect of combinations. Further, it has to be seen that while combining, merging or acquisition; is there any possible danger of stifling ongoing research and development or innovation. The acquisition can limit competition by reducing the number of players in the market or preventing entry of substitutes in the market. There have been instances where concerns have been raised that there are chances of stifling innovation and delaying or negating entry of new products in the market.[12]

Conclusion

The relationship between Intellectual property protection and fair competition presents difficult challenges to policy maker.Fundamentally they present no conflict with other as they are entrusted with different fields of regulation namely economic protection to the innovators and promoting and sustaining competition in the market when innovator enter into market. It is to be noted that the coexistence of IP and competition alone would increase economic and consumer welfare.

The CCI has also recently analyzed certain cases which had an interface between competition law and nuances of intellectual property.Now it high time when the CCI should come up with some specific guidelines to cases related to IPR issue. It is seen that even though section 3(5) of the Competition Act has spelt out that IPR is an exception to the competition issues there is a need for clarity on the issue.[13]

Competition law always seeks to remove market barriers and promote competition among suppliers of goods, services and technologies.Hence only in extreme cases, where IPRs are used unjustifiably by their highly dominant owners,the competition policy interfereto protect the competition in the market.

[11] Pham, Alice (2008), *Competition Law and Intellectual Property Rights: Controlling Abuse or Abusing Control*?,CUTS International, Jaipur, India.

[12]IGNOU Publication, *Trade Secrets, Competition Law and Protection* of TCE., p. 53.

[13] Manoj Sinha and Susmitha P Mallaya, *Emerging Competition Law*, Wolters Kluwer, 2017.